

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
APPENDIX**

No. 76-6111

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and
Trustee of The Last Will and Testament
of MARGARET C. DUNCAN, Deceased,

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

CIVIL APPEAL
FROM UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF NEW YORK

ADDENDUM
TO BRIEF FOR PLAINTIFF-APPELLANT



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26 U. S. C. A.

§ 7426. Civil actions by persons other than taxpayers

(a) Actions permitted.-

(1) Wrongful levy.- If a levy has been made on property or property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States. Such action may be brought without regard to whether such property has been surrendered to or sold by the Secretary or his delegate.

(2) Surplus proceeds.- If property has been sold pursuant to a levy, any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property junior to that of the United States and to be legally entitled to the surplus proceeds of such sale may bring a civil action against the United States in a district court of the United States.

(3) Substituted sale proceeds.- If property has been sold pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), any person who claims to be legally entitled to all or any part of the amount held as a fund pursuant to such agreement may bring a civil action against the United States in a district court of the United States.

(b) Adjudication.- The district court shall have jurisdiction to grant only such of the following forms of relief as may be appropriate in the circumstances:

(1) Injunction.- If a levy or sale would irreparably injure rights in property which the court determines to be superior to right of the United State in such property, the court may grant an injunction to prohibit the enforcement of such levy or to prohibit such sale.

(2) Recovery of property.- If the court determines that such property has been wrongfully levied upon, the court may-

(A) order the return of specific property if the United States is in possession of such property;

(B) grant a judgment for the amount of money levied upon; or

(C) grant a judgment for an amount not exceeding the amount received by the United States from the sale of such property

For the purposes of subparagraph (C), if the property was declared purchased by the United States at a sale pursuant to section 6335(e) (relating to manner and conditions of sale), the United States shall be treated as having received an amount equal to the minimum price determined pursuant to such section or (if larger) the amount received by the United States from the resale of such property.

(3) Surplus proceeds.- If the court determines that interest or lien of any party to an action under this section was transferred to the proceeds of a sale of such property, the court may grant a judgment in an amount of the surplus proceeds of such sale

(4) Substituted sale proceeds.- If the court determines that a party has an interest in or lien on the amount held as a fund pursuant to an agreement described in section 6325(b) (3) (relating to substitution of proceeds of sale), the court may grant a judgment in an amount equal to all or any part of the amount of such fund.

SURROGATE'S COURT PROCEDURE ACT

§205. Effect of exercise of jurisdiction

Jurisdiction once duly exercised over any estate or matter by the court excludes the subsequent exercise of jurisdiction by another surrogate's court over the same estate or matter except as specially prescribed by law. All

further proceedings in the same estate or matter in a surrogate's court must be taken in the same court. L.1966, c. 953.

§206. Exclusive jurisdiction

The surrogate's court of each county has jurisdiction exclusive of every other surrogate's court over the estate of

1. any domiciliary of the county at the time of his death, disappearance or interment;

2. any non-domiciliary of the state who

(a) left property within that county and no other or,

(b) left personal property which since his death, disappearance or interment has come into that county and no other and remains unadministered, or

(c) left a cause of action against a domiciliary of that county for damages for the wrongful death of the decedent and who left no property in any other county. L.1966, c. 953.

§1420. Proceeding for construction of will; effect of decree

1. A fiduciary or a person interested in obtaining a determination as to the validity, construction or effect of any provision of a will may present to the court in which the will was probated a petition showing the interest of the petitioner, the names and post-office addresses of the other persons interested, the particular portion of the will concerning which petitioner requests the determination of the court and the necessity for construction. If the application be entertained process shall issue to all persons interested in the question to be presented to show cause why the determination should not be made. On the return of process the court shall take such proof and shall make such decree as justice requires.

2. If in any proceeding for the judicial settlement of an account of a fiduciary any question is presented by any party to the proceeding respecting the propriety of any debit or credit in the account, the determination of which involves the validity, construction or effect of any portion of the will which requires such effect as if the petition had expressly requested a construction of the particular portion of the will involved in such determination.

3. If a party in a proceeding for the probate of a will requests a determination of the validity, construction or effect or any provision contained in the will process shall issue to all persons interested in the determination who have not appeared in the proceeding and notice shall be given in such manner as directed by the court to all those persons who have so appeared therein. Upon the entry of a decree admitting the will to probate the court may determine the question of construction or in its discretion may admit the will to probate and reserve the question for future consideration and decree.

4. A decree in any proceeding authorized in this section or a decree settling an account of a fiduciary or a decree on probate which construes or interprets any portion of a will, unless reversed or modified on appeal, shall thereafter be binding and conclusive in all courts upon all parties to the proceeding and upon their successors in interest as to all questions of construction or interpretation of the will therein or thereby determined and of all rights and obligations of the parties involved in the construction, depending thereon, or resulting therefrom.

5. The provisions of section three hundred fifteen shall apply to a proceeding under this section. L.1966, c. 953, amended L. 1967, c. 739, §3.

Restatement, Second, Trusts §155.
Discretionary Trusts:

"(1) Except as stated in §156, if by the terms of a trust it is provided that the trustee shall pay to or apply for a beneficiary only so much of the income or principal or either as the trustee in his uncontrolled discretion shall see fit to pay or apply, a transferee or creditor of the beneficiary cannot compel the trustee to pay any part of the income or principal."

. . .Comment on Subsection (1):

..."d. Trust for member of a class. If a trust is created for the members of a class of persons and the trustee has discretion to exclude altogether a member of the class, a transferee or creditor of the member cannot compel the trustee to pay over any part of the trust property."

2 Scott on Trusts (3d Ed.) §155.
Discretionary Trusts"

"Where by the terms of the trust a beneficiary is entitled only to so much of the income or principal as the trustee in his uncontrolled discretion shall see fit to give him, he cannot compel the trustee to pay to him or to apply for his use any part of the trust property. [N] or can creditors of the beneficiary reach any part of the trust property ... If the beneficiary cannot compel the trustee to pay over any part of the trust fund, his assignee and his creditors are in no better position."

RESTATEMENT, JUDGMENTS.

§2. JUDGMENTS IN REM

Where a reasonable opportunity has been afforded to litigate rights of all persons in property before a court which has jurisdiction over the property, and the court has finally determined the rights in property, the interests of the state and of the persons concerned require that the rights in the property shall not be litigated again by anyone.

Comment:

a. Jurisdiction over things. A court by proper service of process acquires jurisdiction to determine interest in things within the state, even though the persons affected thereby are not subject to the power of the state. (See §32.) Where the proceeding affects the interests in the thing, not merely of particular persons, but of all persons in the world, it is called a proceeding in rem. The thing may be land, or a vessel or other chattel, or a document or a chose in action.

A valid judgment in rem cannot be collaterally attacked. It is in accordance with public policy that when the rights have once been finally determined, the questions of the existence of the rights cannot be again litigated. It is in the interest of the successful party and of the public that the matter should be finally determined in the proceeding in which it is decided. It is immaterial that the decision was erroneous on the facts or on the law; and it is immaterial whether the persons whose rights in the thing were affected did or did not avail themselves of an opportunity to object to the judgment. It is immaterial that a person whose rights in the thing were affected did not have actual knowledge of the proceeding, provided that a proper method of notification was employed... The hardship upon a person who had no actual knowledge is outweighed by the policy of permitting a proceeding which will finally determine the rights in the thing.

§3. JUDGMENTS QUASI IN REM.

Where a reasonable opportunity has been afforded to designated persons to litigate their

rights in property before a court which has jurisdiction over the property, and the court has finally decided the controversy, the interests of the state and of the parties require that the rights of the parties in the property shall not be litigated again by them.

Comment:

a. Where property is subject to the jurisdiction of the state, a proceeding may be brought to affect the interests of particular persons in the property, even though the persons are not subject to the jurisdiction of the state. Such a proceeding is called a proceeding quasi in rem (See §32.)

§32. JURISDICTION OVER THINGS.

A court by proper service of process may acquire jurisdiction to determine interests in things within the State, even though the persons affected thereby are not subject to the power of the State.